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No. 90-1037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOHN MOORE,
Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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RESPONDENT REGENTS OF THE UNIVERSITY OF CALIFORNIA BRIEF IN OPPOSITION

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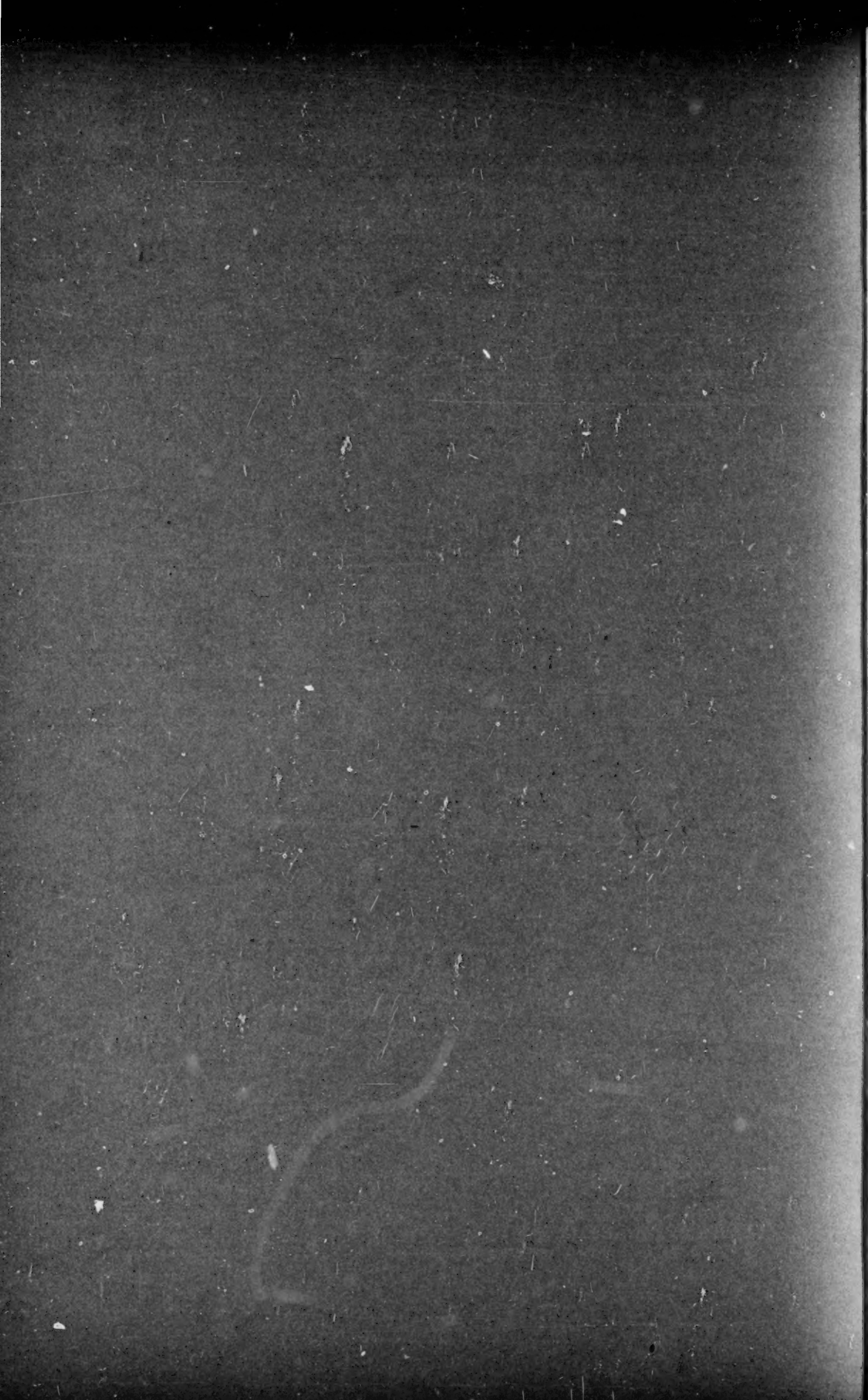

QUESTION PRESENTED

Does a State Supreme Court decision denying a patient's claim for common law conversion of therapeutically excised human tissue constitute a taking of property requiring just compensation under the Fifth and Fourteenth Amendments?

LIST OF PARTIES

The petitioner in this Court and the appellee/plaintiff below: John Moore. The respondents in this Court and appellants/defendants below: The Regents of the University of California; David W. Golde, M.D.; and Shirley G. Quan. Other appellants/defendants below not served the petition in this Court: Genetics Institute, Inc.; Sandoz, Ltd.; Sandoz United States, Inc.; and Sandoz Pharmaceuticals Corporation.

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PRELIMINARY STATEMENT OF FACT AND CASE

The principal issue decided by the California Supreme Court raised on Petition by John Moore ("Moore") is whether a patient's *unqualified* consent to surgery for medical purposes, at a teaching and research hospital, permits the scientific study of the therapeutically removed tissue, or whether such scientific study and disposition of research results constitutes a common law tort of conversion.

Couched in traditional language of conversion, lack of informed consent, breach of fiduciary duty, fraud and deceit, Moore's complaint sought to establish an unprecedented cause of action. While admitting consent to the surgical removal of his spleen for therapeutic purposes, Moore claimed additional consent was needed before The Regents of the University of California ("University") could conduct any scientific investigation involving the removed tissue, or before any disposition could be made of the University's research results. Moore alleged he came to the University's UCLA Medical Center in August, 1976 seeking confirmation and treatment for his diagnosed hairy cell leukemia. The diagnoses was confirmed and Moore was advised that his malignant spleen should be surgically removed. On or about October 19, 1976 Moore signed a *written consent* authorizing the splenectomy based upon the representation that its removal was "necessary for his care, treatment and diagnoses." The amended complaint does *not* challenge or question the need for that medical treatment or the representations about it.

Shortly before Moore's splenectomy, respondent David W. Golde, M.D., Professor of Medicine, instructed his research associate, respondent Shirley G. Quan, to obtain a specimen of the surgically removed spleen "to study and characterize the nature" of its cells and substances before its destruction. That study upon the splenic tissue resulted in the development of a cell line (denominated "Mo cell line") and continued over several years. It was reported to the University as a possible invention in August, 1979, almost three years after the splenectomy. Subsequently, the University applied for and received a patent on the invention.

The subject of Moore's claim is the Mo cell line, its related patent and the medical advancements of the University's study involving it. While Moore's complaint infers an improper connection between the University's

scientific study and his post-splenectomy medical treatment, it simply does *not* allege anything occurred absent, or in excess of, appropriate medical treatment for a proper medical purpose. Moore's action is *not* based upon any alleged medical malpractice, *nor* upon any physical or personal injury; rather, he seeks damages *solely* because he had not expressly consented to the University's post-operative "research *and* commercial activities."

The California Superior (trial) Court sustained the University's general demurrers through several versions of the complaint, with leave to amend, essentially holding that Moore's admitted consent was unqualified, not vitiated, and by reference incorporated into each cause of action. The court noted the complaint: did not deny Moore knew (or had reason to know) therapeutically removed tissue "might be used for medical and scientific study"; did not allege the University knew or intended (prior to the splenectomy) to exploit any commercial utility; and, did not allege any inconsistency between Moore's consent and the University's purpose in excising the tissues. Moore declined to further amend his complaint, and instead tendered a judgment dismissing the case which the court entered.

A divided California Court of Appeal reversed. (*Moore v. Regents of University of California, et al.*, 202 Cal. App.3d 1230 (1988). The majority held: that surgically removed human tissue was tangible private property of the patient; and that, absent expressed consent, the University's scientific study of such tissue constitutes a conversion. The dissent argued against the application of private property principles to surgical tissue, absent legislative enactment. It also suggested the consent to surgery constituted an abandonment of any patient property, since there was no expectation of a continued possessory interest.

A divided California Supreme Court affirmed in part, reversed in part, and remanded the case with direction to

the California Court of Appeal (*Moore v. Regents of the University of California, et al.*, 51 Cal.3d 120, 148 (1990). The majority held: that absent legislative enactment, the court would not create new tort duties expanding the strict liability of conversion for the scientific use of therapeutic human cells; that physicians must disclose to patients, their research and economic interest that may affect their judgment in rendering medical treatment, to protect patients from any conflicts of interests; and, accordingly, that Moore's third amended complaint stated a cause of action for breach of fiduciary duty or lack of informed consent against Dr. Golde, but not the other defendants, and did not state a cause of action for conversion.

REASON FOR DENYING THE WRIT

I. THERE IS NO "FEDERAL LAW QUESTION" SUPPORTING THE WRIT

Rule 10 of the United States Supreme Court provides that a writ of certiorari will be granted "only when there are special and important reasons therefore." The only Rule 10 criteria possibly applicable to this case is stated in 10.1(c) favoring writs where a "state court . . . has decided an important question of federal law . . . ." The California Supreme Court decision below did *not* decide a question of federal law.

In denying Moore's asserted common law tort of conversion, the California Supreme Court held:

> "There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patient's rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion." (51 Cal.3d at 142-143.)

That analysis was predicated upon the Court's conclusion that, "Moore's novel claim to own the biological materials at issue in this case is problematic, at best." (*Ibid.*) That conclusion was based upon the Court's analysis of existing California law to determine if Moore "retained an ownership interest" in the cells following their surgical removal. The Court concluded:

> "[T]here are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property." (*Ibid.*, at 137.)

Thus, the California Supreme Court decision below rests upon its refusal to *extend* the principles of private property ownership to therapeutically excised cells for purposes of bringing a state law tort action of conversion.

The central misconception of Moore's petition to this Court is that the Constitutional mandate of "just compensation" requires, or even allows, federal courts to create a federal common law governing the ownership of therapeutically excised cells. On the contrary, such a property right must already exist under the appropriate body of law before federal "takings" analysis can come into play.

> "The first step in both due process and takings analysis is to determine whether there is a property right that is protected by the Constitution." (*Peterson v. U.S. Department of Interior*, 899 F.2d 799, 807 (9th Cir. 1990), cert. den., 111 S.Ct. 567 (1990).

Without this first step, there is no "taking within the meaning of the Fifth Amendment." (*Bowen v. Agencies Opp. to Soc. Sec. Entrap.*, 477 U.S. 41, 55-56 (1986).

> "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980).

Using the takings clause to federalize property law would contravene its constitutional context. As this Court has repeatedly held, "the property rights protected by the Takings Clause are those property rights created by state law." (*Furey v. City of Sacramento*, 592 F.Supp. 463, 469 (E.D. Cal. 1984) affd., 780 F.2d 1448 (9th Cir. 1986).

Creating property interests is *not* a federal constitutional function:

> "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

The California Surpeme Court decision in this case does not raise an "important question of federal law" for this Court to review and decide; rather, the decision below is premised solely upon state common law of tort and property.

II. THE DECISION BELOW DOES NOT CONSTITUTE A TAKING REQUIRING JUST COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

Moore's petition attempts to justify its appeal to this Court by arguing the decision below exceeds the constitutional constraints on state courts:

1. First, referring to dictum in *Demorest v. City Bank Farmers T. Co.*, 321 U.S. 36, 42 (1944) (a due process case decided on a non-federal ground), Moore notes ". . .

it is the providence of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis," to suggest the decision below is an arbitrary change of state property law.

2. Second, referring to *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*, 449 U.S. 155, 164, Moore offers a torturous reading of the doctrine that a sovereign, ". . . , by *ipse dixit*, may not transform private property into public property without compensation, . . ." to suggest the decision below is an "arbitrary use of government power." (*Ibid.*)

However, the authorities cited in both arguments, are premised upon the existence of a property interest that is either arbitrarily changed or taken by the state. And, as already noted, the California Supreme Court decision is premised upon an analysis that a property ownership interest *does not exist* under California state law.

In *Demorest*, this court found a substantial non-federal basis existed for a new rule affecting trust beneficiaries, despite a difference of opinion in New York's Court of Appeals as to the effect of earlier cases on the subject. Emphasizing the novelty of the property claim facing the state court, this Court observed:

> "In thus rejecting appellants' version of its previous decisions the Court of Appeals disposed of their cases on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case, appellants have no question for us under the Due Process Clause." (*Demorest, supra*, 321 U.S. at 42.)

Similarly, the California Supreme Court conclusion that petitioner Moore lacked sufficient indicia of property ownership for an expanded application of common law conversion presents, "no question" under the Due Process Clause. In both its examination of Moore's interest under existing California law, *and* in its conclusion to defer to the legislature any decision to expand the strict

liability of conversion, the California Supreme Court did *not* evade a constitutional issue and fair support exists for the state's non-federal ground. Accordingly, as in *Demorest*, ". . . this Court [should] not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." (*Ibid.*)

In *Webb's Fabulous Pharmacies*, this Court found an unconstitutional taking when the Florida county court withheld the interest accruing on a private interpleader fund deposited in the county court, where such deposit is required and a separate clerk's fee for "services rendered" based upon the amount deposited is also charged. Thus, the county's services were compensated and the interest represented an additional unrelated sum. However, that case lends no support to petitioner Moore. Unlike the novel and unestablished claim presented in *Moore*, the creditors in *Webb's* had ". . . a state-created property right to their respective portions of the fund." (*Webb's*, *supra*, 449 U.S. at 161.) That is the very premise lacking in *Moore*.

The California Supreme Court conclusion that existing state law does not provide a patient adequate ownership interest over therapeutically removed human cells to mandate a conversion cause of action, and the Court's deference to the legislature and refusal to extend the strict liability theory of conversion, does *not* constitute an arbitrary change or use of state law, or a taking requiring just compensation under the Fifth and Fourteenth Amendments.

III. PETITIONER'S TAKING CLAIM WAS WAIVED

Moore's petition (p. 13, fn. 14) argues at length that his taking claim was not ripe until his conversion cause of action was denied by the California Supreme Court decision below. However, the Fifth Amendment provides in pertinent part that private property shall not be ". . .

taken for public use, without just compensation." It ". . . does not prohibit the taking of private property, but instead places a condition on the exercise of that power." (*First Lutheran Church v. Los Angeles County* 482 U.S. 304, 314 (1987).) A claim for the "wrongful" taking of conversion is not identical to a "just compensation" claim for a proper exercise of public power. Unlike tort claims, which seek damages for the breach of a public duty, the aim of the takings doctrine is "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*Id.* at p. 315, emphasis in original.)

As Moore's petition notes, "[n]o constitutional violation occurs until just compensation has been denied." (*Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985).) However, where a California plaintiff has failed to follow the available state procedure for obtaining compensation, the claim must be dismissed as waived. (See *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 737-738 (9th Cir. 1987).) If Moore genuinely believed the University's conduct constituted a taking requiring just compensation, he fails to explain why no claim was made for inverse condemnation.[1] Instead, petitioner Moore sought to expand the common law tort of conversion. There are notable distinctions both as to the scope of possible defendants and the extent of possible damage claims between a claim of conversion and one for inverse condemnation; distinctions that were the subject of his election in seeking conversion and *not* condemnation. Obviously, Moore was more interested in claiming the results of the University's re-

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[1] "Where property has been taken or damage for public use without a condemnation proceeding, the owner may bring an action to obtain the just compensation which he is guaranteed by the state constitution . . . . An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor." (29 Cal.Jur.3d, Eminent Domain, § 302, pp. 450-451.)

search (by claiming a wrongful taking) than in just compensation for the surgically removed diseased tissue. That was the election he made.

Furthermore, as Moore's petition admits, his taking claim was not asserted until the California Supreme Court rendered its decision. He did *not* address the issue in the trial court, notwithstanding the University's assertion he had no property interest. He did *not* address the issue in the California Appellate Court, notwithstanding the trial court's dismissal of his complaint. Clearly, it was not a matter of his interest until an unfavorable final decision below. He admits as much by suggesting it was "unripe" at any earlier stage. But he is in error, having failed to follow the state procedure for obtaining just compensation, he made an irrevocable election waiving his takings claim.

CONCLUSION

Upon the reasons stated above, respondent The Regents of the University of California respectfully submit there is no important question of federal law raised in the California Supreme Court decision denying Moore's claim for a state common law conversion cause of action. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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